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MOHAMAD NOHING & ORS

v.

PEJABAT TANAH DAN GALIAN NEGERI PAHANG & ORS

B

HIGH COURT MALAYA, TEMERLOH
AKHTAR TAHIR J
[JUDICIAL REVIEW NO: 25-4-2007]
18 MARCH 2013

C

ADMINISTRATIVE LAW: *Remedies - Judicial review - Customary land - Land claimed to be part of aborigine inhabited land by Semalai native tribe - Rights to - Whether Semalais an identifiable aborigine group - Whether applicants descendants of Semalais - Whether area*
D *claimed amply identified - Whether Aboriginal Peoples Act 1954 sought to protect and uplift rights of aborigines - Whether gazetting of area as Malay Reserve Land and setting up of FELCRA scheme amounted to illegal encroachment*

LAND LAW: *Customary land - Rights to - Land claimed to be part of*
E *aborigine inhabited land by Semalai native tribe - Whether Semalais an identifiable aborigine group - Whether applicants descendants of Semalais - Whether area claimed amply identified - Claim for land for foraging and hunting - Whether justifiable*

F The applicants, from a native tribe called Semalai, claimed for an area of land ('native customary land') alleged to be part of aborigine inhabited land in the district of Bera, Pahang, on the basis that the Semalais had occupied and inhabited the land for generations. The claim by the applicants, by way of judicial review
G application, was triggered by the fact that the State Government had given approval for a project to be undertaken on the native customary land. The issues to be determined by the court were, *inter alia,*: (i) whether the Semalais were an identifiable aborigine group; (ii) whether the applicants were the descendants of
H Semalais; (iii) whether the area claimed had been amply identified; (iv) the status of customary land against Malay Reserve Land and FELCRA; and (v) whether seeking of land for foraging and hunting justifiable.

I

Held (allowing the application):

(1) The Malaysian courts had given due recognition to the rights of natives over customary land, and it was clear from the various decisions meted out by the highest court of the land. (*Bato Bagi v. Kerajaan Negeri Sarawak & Another Appeal*, refd; *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors*, foll). (para 5)

(2) The court was bound by the decision of *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* which held that the purpose of the Aboriginal Peoples Act 1954 ('the 1954 Act') was to protect and uplift the first peoples of the country and therefore the 1954 Act calls for a liberal construction in favour of the aborigines as enhancing their rights rather than curtailing them. Apart from that, the fact that the 1954 Act was enacted at all is a testimony that the rights of the aborigines over the land occupied had been given due recognition. (paras 10 & 13)

(3) Based on the evidence produced by the expert, SP1, the court was satisfied that the Semalais were identifiable aborigine native groups and have existed in the Bera region for a considerable period of time. The findings and opinion of SP1, based on his own research and research done by other persons whom he had extensively quoted, was accepted and considered because it was unchallenged by the defendants who did not produce an expert of their own to dispute the findings and opinion of SP1. (paras 16, 18, 19 & 24)

(4) The applicants were truly the descendants of Semalais from a continuous line of the earliest Semalais having set foot in the Bera area especially in the area of dispute. The applicants produced a family tree dating back to many generations, which information was by word of mouth, an acceptable means of information being carried from generation to generation. The first applicant and other members of the community were also familiar with the landmarks and were able to identify the various earlier settlements, structures and geographical spaces. (paras 25, 26 & 27)

(5) Although the size of the land could be determined from the correspondences, the boundaries of the area remain uncertain and thus, the boundaries should follow the natural terrain rather than mechanically marking the boundaries. Further, the Semalais did not surrender occupation of any part of the customary land although they were forced to abandon the area called Padang Kepayang after the big flood in 1975. The movement out of the area was more out of safety rather than abandonment of their rights and hence, the setting of boundaries must also include the Padang Kepayang area. (paras 32 & 33)

(6) The rights over the land accrued to the Semalais the minute they set their foot in the Bera region and from the time the court recognises the right or the state recognises the right. Therefore, any other alienation after the period when the rights first accrued, including the area gazetted as Malay Reserve Land in 1923 or the setting up of the FELCRA, were illegal encroachment. Hence, the portion of the Malay Reserve Land encroaching upon the land had to be de-gazetted and the land utilised by FELCRA had to be vacated and the boundaries set up be removed. (paras 34, 35 & 44)

(7) Foraging and roaming of the jungle was an inbuilt instinct of the aborigine people which could not be extinguished by providing them with modern amenities. The extent to which the aborigine community was to be allowed to satisfy their inborn instinct was something which the 1954 Act sets to define. Hence, the area of the land to be alienated for the purpose of the aborigine community should take into consideration the facts of each case, *ie*, the size of the community and to what extent they should be allowed to roam and forage, as their dependence on the land for sustenance and well being still remains the same. (paras 37, 39, 40, 41 & 43)

Case(s) referred to:

Alexkor Ltd v. Richtersveld Community [2003] 12 BCLR 1301 ***(refd)***

Amodu Tijani v. The State Secretary, Southern Nigeria [1921] 2 AC 399 ***(refd)***

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***

Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(foll)***

Legislation referred to:
Federal Constitution, art. 8(5)(c)

For the applicants - Lim Heng Seng (Fara Nadia Hashim & Lisa Tan Yu Wan with him); M/s Lee Hishamuddin, Allen & Gledhill
For the 1st & 2nd respondents - Mat Zaraai Alias (Kamal Azira Hassan with him); State Legal Advisor
For the 3rd & 4th respondents - Noor Hisham Ismail (Muzila Mohamed Arshad with him); SFCs

Reported by S Barathi

JUDGMENT

Akhtar Tahir J:

[1] The applicants in this case claiming to be from a native tribe called Semalai have made a claim for an area of land which they claim to be part of aborigine inhabited land. The area claimed includes three areas called Padang Kepayang, Kampung Bukit Rok and Kampung Ibam (to be referred hereafter as the native customary land) in the district of Bera, Pahang. The native customary land is being claimed on the basis that the Semalais have occupied and inhabited the land for generations.

[2] The claim by the applicants made by way of judicial review application was triggered by the fact that the State Government had given approval for a project to be undertaken on the native customary land being claimed by the applicant.

Rights Of Natives Under The Federal Constitution

[3] Under art. 8 of the Federal Constitution although equality and equal protection before the law is a fundamental right, it does not invalidate or prohibit extra protection to the natives.

[4] Article 8(5)(c) states as follows:

> This Article does not invalidate or prohibit-Any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula **(including the reservation of land)** ... (emphasis added)

Status Of Customary Land In Malaysian Context As Recognised By The Malaysian Courts

[5] It is to be noted that the Malaysian courts have given due recognition to the rights of natives over customary land. This is clear from the various decisions meted out by the highest court of the land.

[6] I will begin with the Federal Court case of *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766 where the issue was not so much the recognition of native customary land but more under what circumstances this rights over native customary land can be extinguished. Richard Malanjum CJ (Sabah & Sarawak) in para. 125 stated as follows:

> As for the argument that the Government stands in a fiduciary position to protect the interest of the natives, I am of the view that such notion has been accepted by our Courts. (See: *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* (*supra*). It has also been adopted in foreign jurisdictions. (See for instance the Supreme Court of Canada in *Delgamuukw v. British Columbia* [1997] 3 SCR 1010). It is therefore not unheard of that the Government ought to protect the interest of the natives and stand in a fiduciary position *vis a vis* the natives ...

[7] The Court of Appeal case of *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169 decided two matters the first being that the Malaysian courts recognised common law right over native customary land and the second that such rights existed despite the Aboriginal Peoples Act 1954 ("the Act").

[8] Gopal Sri Ram JCA stated that the definitive position at common law is that stated by Viscount Haldane LC in the case of *Amodu Tijani v. The State Secretary, Southern Nigeria* [1921] 2 AC 399. His Lordship then continued and stated as follows:

> First, that the fact that the radical title to land is vested in the Sovereign or State (as is the case here) is not an *ipse dixit* answer to a claim of customary title. There can be cases where radical title is burdened by a native or customary title. The precise nature of such customary title depends on the practices and usages of each individual community. And this brings me to the second important point. It is this. What the individual practice and usages in regard to the acquisition of customary title is a matter of evidence as to the history of each particular community. In other words it is a question of fact to be decided (as was decided in

this case) by the primary trier of fact based on his or her belief of where on the totality of evidence, the truth of the claim made lies ...

Common Law v. Aboriginal Peoples Act 1954

[9] His Lordship Gopal Sri Ram JCA then in *Sagong Tasi*'s case (*supra*) further discussed whether the Aboriginal Peoples Act 1954 excluded the common law.

[10] His Lordship begun by determining the purpose the Act was enacted referring to proximately contemporaneous material that included an article in the Malay Mail quoting Dato Sir Onn Jaaffar's speech in the Federal Legislature, the debate in the Federal Legislative Assembly and, the policy statement issued by the Jabatan Hal Ehwal Orang Asli Department (JHEOA). After referring to the above materials His Lordship concluded at p. 185 as follows:

Now, the extrinsic material to which I have referred makes it abundantly clear that the purpose of the 1954 Act was to protect and uplift the First Peoples of this country. It is therefore a human rights statute. It acquires a quasi constitutional status giving it pre-eminence over ordinary legislation. It must therefore receive a broad and liberal interpretation ...

[11] In p. 186 His Lordship further stated:

There is therefore no doubt in my mind that the 1954 Act calls for a construction liberally in favour of the aborigines as enhancing their rights rather than curtailing them.

[12] In my mind apart from the decision of the Court of Appeal above to which I am bound, the fact that the Act was enacted at all is a testimony that the rights of aborigines over the land occupied has been given due recognition.

[13] What the Act seeks to do if at all is to define the rights and limits of the land area over which the aborigines can lay a claim to. It is necessary to define the limits as well as gazette this limits to protect the land from being encroached and trespassed by unrelated individuals or groups. A further reason could be that rapid development of the country necessitates for a boundary to be fixed to encompass the actual requirement of the particular aborigine group.

[14] Having determined that both common law and statute recognises native customary land I now move on to the facts of the case at hand. As observed by Gopal Sri Ram JCA in *Sagong Tasi*'s case finding of facts form the substratum of the case for making out customary community title amply supported by cogent evidence.

[15] In this case I have made the following finding of facts:

Semalais Are An Identifiable Aborigine Group

[16] In making a finding that the Semalais are an identifiable native aborigine group I relied on the testimony of Dr Colin George Nicholas (SP1) in court as well as his affidavit in support of the application of the applicants.

[17] I accepted the evidence of Dr Colin as an expert based on his qualifications and achievements. The qualification are too numerous to note everything down but can be seen from his biodata. The qualifications and biodata of Dr Colin are contained in his affidavit (bundle C).

[18] I noted however that Dr Colin was a partisan witness as he had shown his partiality in supporting the application of the applicants by filing an affidavit and from my observation he was at the side of the applicants throughout the trial and he sat in court in jotting down notes. To me being a partisan witness does not make SP1 an unreliable witness. Further SP1's findings are based not only his research but more on the research done by other persons whom he has quoted extensively.

[19] The defendants also did not produce an expert of their own to dispute the findings and opinion of SP1 and therefore the evidence of SP1 can be accepted and considered as it is unchallenged.

[20] In his affidavit, Dr Colin has outlined in detail the presence of natives loosely called Orang Asli in the Peninsular Malaysia since thousands of years ago. I do not purport to go into the details of this early arrival suffice to say I am satisfied of the presence of Orang Asli in Peninsular Malaysia. This fact has also not been challenged by the defendants.

[21] Dr Colin further speaks of presence of Orang Asli in the region of Pahang and this is borne out by the writings of various authors studying the matter. More important is that this early writings confirm that amongst the Orang Asli groups present in Pahang are the Semalais.

[22] Amongst others Dr Colin referred to the publication of Pater P Schebesta an ethnographer in the *Bulletin of the School of Oriental and Asian Studies* in 1926. It was stated in this publication that:

> within the category "Jakun" the Semalai are specifically associated with the Bera River Drainage Area. In addition he estimates (at page 274) that the Semalai population to be about 2000.

[23] There are a number of other references of the presence of Semalais in the Bera region as stated by Dr Colin as stated from para. 31 to para. 37 of his affidavit (bundle C).

[24] As a conclusion I am satisfied that the Semalais are identifiable aborigine native groups who have existed in the Bera region for a very considerable period of time.

Applicants Are The Descendants Of Semalais

[25] The first applicant in order to show that he and other members of the community are descendants of the early Semalais in the region produced a family tree dating back many generations. The information contained in the family tree was by the word of mouth which to me is an acceptable means of information being carried from generation to generations. I noticed that the first applicant and the native community as a whole took great pride in retracing their ancestry perhaps more than other races in Malaysia.

[26] I also made a site visit to the disputed area and observed that the first applicant and the other members of the community who were present were familiar with the landmarks and were able to identify the various earlier settlements, structures and geographical spaces. They could also identify the grave of their ancestors nestled in dense jungle and marked with objects like pots.

[27] I was satisfied that the applicants were truly the descendants from a continuous line of the earliest Semalais having set foot in the Bera area especially in the area of dispute.

The Area Claimed Has Been Amply Identified

[28] Dr Colin had studied the various maps and writings and concluded that "the Semalai Orang Asli without doubt the earliest inhabitants of the Bera area" (para. 48 of affidavit bundle C).

[29] I do not wish to go into details but I agree with this above conclusion of Dr Colin based on his reasoning given in paras. 38 to 47 of his affidavit (bundle C).

[30] The history of the earliest settlements of the Semalais on the Bera river until its existence till today is well expressed by Dr Colin from paras. 61 to 69 of his affidavit (bundle C).

[31] I wish to emphasise here that there were various unsuccessful attempts to gazette at least 2,023.47 hectares which formed part of customary land the boundaries which were determined using natural terrain of rivers and hills.

[32] Although the size of the land can be determined from the correspondences the boundaries of the area remain uncertain but can be determined with the help of the applicants. In this respect I agree with the first applicant the boundaries should follow the natural terrain rather than mechanically marking the boundaries.

[33] In this case I also decided that the Semalais did not surrender occupation of any part of the customary land although after the big flood in 1975 they were forced to abandon the area called Padang Kepayang. The movement out of the area was more out of safety rather than abandonment of their rights. I therefore have determined that any setting of boundaries must include the Padang Kepayang area.

Status Of Customary Land Against Malay Reserve Land And FELCRA

[34] Even before looking at any legislation it is my finding that the rights over the land accrued to the Semalais the minute they set their foot in the Bera region. The rights over the land do not begin from the time the court recognises the right or the State recognises the right. It accrues very much earlier.

[35] Having determined this any other alienation after the period when the right first accrued is illegal and can be regarded as an encroachment. This includes the area gazetted as Malay Reserve Land in 1923 or the setting up of the FELCRA scheme.

Land Sought For Foraging And Hunting Is It Justifiable?

[36] It must be recognised that not all area of land is occupied by the aborigine people for the sole purpose of cultivation of crops or other subsistence but rather a large area of land is required to roam and forage.

[37] To me if the law recognises the rights of the aborigines over land it must also give rights and recognition of the customary activities carried out by the aborigines which includes hunting, roaming and foraging the jungle. The instinct to roam, hunt and forage the jungle is an inbuilt instinct of the aborigine people which cannot be extinguished by providing them with modern amenities.

[38] It was argued by the defendants that the applicants had been relocated and provided with school, hospital and other modern amenities. In fact during my visit to the area in dispute I noticed that the first applicant in this case and his other community members were well settled with having comfortable homes.

[39] It was argued by the defendants as the applicants had been given all the facilities by the State Government they could not claim the land for the mere purpose of foraging and roaming the jungle.

[40] I heard the testimony of the first applicant who testified as SP2 and I was satisfied and convinced by his testimony that foraging and roaming of the jungle was something which the community could not give up despite being given all the comforts of modern living.

[41] The extent to which the aborigine community was to be allowed to satisfy their inborn instinct is something which the Act sets to define. To me the area of the land to be alienated for the purpose of the aborigine community should take into the facts of each case taking into consideration the size of the community and to what extent they should be allowed to roam and forage.

[42] In the case of *Alexkor Ltd v. Richtersveld Community* [2003] 12 BCLR 1301 the extent of the right was stated as follows:

> In the light of the evidence and of the findings by the SCA (Supreme Court of Appeal) and the LCC (Land Claims Court) we are of the view that the real character of the title that the Richtersveld Community possessed in the subject land was right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit the natural resources, above and beneath the surface.

[43] Further I would agree with Dr Colin when he stated in para. 143 of his affidavit (bundle C) "Thus, while the nature of their economic activity has changed over time, their dependence on the land for sustenance and wellbeing still remains the same". Dr Colin was referring to the change of activities of Semalais from purely subsistence activities to more cash-based activities such as rubber and oil palm cultivation as well as small businesses.

[44] In the light of the above findings I made the following orders:

(a) I declared that the portion of the Malays Reserve Land encroaching upon the land as claimed by the Semalais as an illegal encroachment and has to be de-gazetted;

(b) I declared that the land utilised by FELCRA that encroaches upon the land claimed is an illegal encroachment and has to be vacated and the boundaries set up be removed with the cost to be borne by FELCRA;

(c) I directed the relevant land authorities with the assistance of the applicants immediately take measures to identify and draw the boundaries of the claim using natural boundaries of rivers and hills and take steps to gazette the identified area the size which corresponds as close as possible to the area claimed. I directed that this exercise right up to gazetting take not more than one year; and

(d) I disallowed the applicants' claim for damages although there was an encroachment and breach of fiduciary duty on the part of the State as I could not detect any tangible loss suffered by the applicants apart from suffering inconvenience.

[45] I directed cost to be taxed before the Senior Assistant Registrar. In trying this matter I noted a number of weaknesses in the record keeping of the relevant authorities when discovery of documents was directed by the court. From the feedback received by the counsels appearing for both the parties in this case it was observed that the records of customary land were not kept in proper manner and many documents including correspondence of the natives and native bodies with the authorities were missing. It could not be determined whether this was due to sheer carelessness of the authorities or it was purposely done by design. To complicate matters the witnesses called by the respondent to assist the court took an indifferent attitude towards the issues at hand and were generally ignorant of the matters at hand to be of any assistance. This lackadaisical attitude on the part of the authorities needs to be rectified.